



MICHELLE LUJAN GRISHAM
GOVERNOR

JAMES C. KENNEY
CABINET SECRETARY

Via Electronic Mail

May 25, 2021

Charles W. Maguire, Director
Water Quality Protection Division (6WD)
U. S. Environmental Protection Agency
1201 Elm Street, Suite 500
Dallas, Texas 75202
maguire.charles@epa.gov

Re: State Certification Pesticide General Permit Reissuance NPDES Permit No. NMG87####

Dear Director Maguire:

Enclosed, please find the state certification for the proposed National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit (PGP) for Discharges from the Application of Pesticides. NMED comments on the proposed PGP were submitted to Docket ID # EPA-HQ-OW-2020-0005-0001 via the Regulations.gov website on March 15, 2021. New Mexico-specific conditions are enclosed on separate sheets.

The U.S. Environmental Protection Agency (EPA) proposes to regulate discharges under the above referenced NPDES general permit. A state Water Quality Certification is required by the federal Clean Water Act (CWA) Section 401 to ensure that the action is consistent with State law (New Mexico Water Quality Act, New Mexico Statutes Annotated (NMSA) 1978, §§ 74-6-1 to -17) and complies with State of New Mexico Water Quality Standards and the Statewide Water Quality Management Plan and Continuing Planning Process, including Total Maximum Daily Loads (TMDLs) and the State's Antidegradation Policy.

Pursuant to State regulations for permit certification (Section 20.6.2.2001 New Mexico Administrative Code (NMAC)), EPA jointly with the New Mexico Environment Department (NMED) issued a public notice of the draft permit and announced a public comment period posted on the NMED web site at <https://www.env.nm.gov/surface-water-quality/public-notice/> on January 15, 2021. NMED published notice of the State's Certification in the Albuquerque Journal on January 29, 2021. The NMED public comment period ended on March 16, 2021. NMED did not receive any comments. EPA submitted a request for certification dated March 26, 2021 setting a deadline for NMED to exercise CWA Section 401 certification rights by May 25, 2021.

Sincerely,

Shelly Lemon  Digitally signed by Shelly Lemon
Date: 2021.05.25 11:00:38 -06'00'

Shelly Lemon, Bureau Chief
Surface Water Quality Bureau

cc: (w/ enclosures)

Chelsea Durant, USEPA Headquarters (durant.chelsea@epa.gov)
William F. Cooper, USEPA Region 6 (cooper.williamf@epa.gov)
Evelyn Rosborough, USEPA Region 6 (rosborough.evelyn@epa.gov)
Brent Larsen, USEPA Region 6 (larsen.brent@epa.gov)
Rebecca Roose, Deputy Secretary, NMED (rebecca.roose@state.nm.us)
Brad Lewis, Director, NMDA, Agriculture & Environmental Services Division (blewis@nmda.nmsu.edu)

David W. Gray, Acting Regional Administrator
U.S. Environmental Protection Agency
1201 Elm Street, Suite 500
Dallas, TX 75202

May 25, 2021

STATE CERTIFICATION

RE: Pesticide General Permit; NPDES Permit No. NMG87####

Dear Acting Regional Administrator Gray:

The Cabinet Secretary of the New Mexico Environment Department (NMED) delegated signatory authority for state certifications of federal Clean Water Act permits to the Surface Water Quality Bureau Chief. NMED examined the proposed NPDES permit referenced above. The following conditions are necessary to assure compliance with the applicable provisions of the Clean Water Act Sections 208(e), 301, 302, 303, 306, and 307 and with appropriate requirements of State law. Compliance with the terms and conditions of the permit and this certification will provide reasonable assurance that the permitted activities will be conducted in a manner which will not violate applicable State water quality standards and water quality management plan and will comply with the State's antidegradation policy.

The State of New Mexico

- ☐ () certifies that the discharge will comply with the applicable provisions of Sections 208(e), 301, 302, 303, 306 and 307 of the Clean Water Act and with appropriate requirements of State law.
- ☒ (X) certifies that the discharge will comply with the applicable provisions of Sections 208(e), 301, 302, 303, 306 and 307 of the Clean Water Act and with appropriate requirements of State law upon inclusion of the following conditions in the permit (see attachment).
- ☐ () denies certification for the reasons stated in the attachment.
- ☐ () waives its right to certify.


In order to meet the requirements of State law, including water quality standards and appropriate basin plan as may be amended by the water quality management plan, each of the conditions cited in the draft permit and the State certification shall not be made less stringent unless changes are in response to formal comments received by EPA, the changes are discussed with NMED, and NMED concurs with the changes prior to the finalization of the proposed permit.

The Department reserves the right to amend or revoke this certification if such action is necessary to ensure compliance with the State's water quality standards and water quality management plan.

Please contact Susan A. Lucas-Kamat at (505) 946-8924 if you have any questions concerning this certification. Conditions pertaining to this draft permit are attached. NMED comments on the proposed Pesticide General Permit (NPDES Permit No. NMG87####) were submitted to Docket ID # EPA-HQ-OW-2020-0005-0001 via the Regulations.gov website on March 15, 2021.

Sincerely,

Shelly Lemon

 Digitally signed by Shelly Lemon
Date: 2021.05.25 11:01:03 -06'00'

Shelly Lemon, Bureau Chief
Surface Water Quality Bureau

State of New Mexico
CWA Section 401 Certification Conditions on the
Proposed NPDES Permit No. NMG87####
Pesticide General Permit (PGP)
May 25, 2021

Federal and State Citations

National Pollutant Discharge Elimination System (NPDES) regulations at 40 Code of Federal Regulations (C.F.R.) 122.44(d)(1)(i) require that permit "limitations must control all pollutants or pollutant parameters...which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality."

40 C.F.R. 124.53(e) details requirements for State certification. Pursuant to 40 C.F.R. 153(e)(1), State certification will be in writing and will include, "conditions which are necessary to assure compliance with the applicable provisions of Clean Water Act (CWA) Sections 208(e), 301, 302, 303, 306 and 307 and with appropriate requirements of State law."

40 C.F.R. 124.53(e)(2) states that for each condition more stringent than those in the draft permit, "... the certifying State agency shall cite the CWA or State law references upon which that condition is based. Failure to provide such a citation waives the right to certify with respect to that condition."

40 C.F.R. 124.53(e)(3) states that for each condition less stringent than those in the draft permit, "a statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards. Failure to provide this statement for any condition waives the right to certify or object to any less stringent condition which may be established during the EPA permit issuance process."

New Mexico adopted surface water quality standards (WQS) in accordance with CWA Section 303 and the New Mexico Water Quality Act, New Mexico Statutes Annotated (NMSA) 1978, §§ 74-6-1 to -17. State WQS are published in Title 20, Chapter 6, Part 4 of the New Mexico Administrative Code (20.6.4 NMAC), *Standards for Interstate and Intrastate Surface Waters*, as amended by the New Mexico Water Quality Control Commission (WQCC) and approved by the U.S. Environmental Protection Agency (EPA) on July 24, 2020. The regulations at 20.6.4.8 NMAC outline the State's antidegradation policy and implementation plan. Appendix A of the Water Quality Management Plan and Continuing Planning Process (WQMP/CPP) details the antidegradation policy implementation procedures related to and in concurrence with 20.6.4.8 NMAC. The WQCC approved the revised WQMP/CPP on September 21, 2020, and EPA approved the revised WQMP/CPP on October 23, 2020. The WQMP/CPP also includes Appendix B, New Mexico's list of approved Total Maximum Daily Loads (TMDLs), which was last updated on December 28, 2020. Additional State regulations and standards are published in Title 20, Chapter 6, Part 2 of the New Mexico Administrative Code (20.6.2 NMAC), *Ground and Surface Water Protection*, as amended by the WQCC on December 21, 2018.

The following conditions of certification are necessary to assure compliance with the applicable provisions of the Federal CWA Sections 208(e), 301, 302, 303, 306, and 307 and with appropriate requirements of State law. The purpose of the CWA Section 401 Certification is to reasonably ensure that the CWA Section 402 NPDES permitted activities will be conducted in a manner that will comply with applicable State WQS, including the antidegradation policy and the statewide water quality management plan.

Nothing in this certification shall be construed to preclude any requirement or legal action under the New Mexico Pesticide Control Act, NMSA 1978, §§ 76-4-1 to -39, and rules authorized by this Act (21.17.50, 20.17.51, 20.17. 53, and 21.17.56 NMAC) as administered and enforced by the New Mexico Department of Agriculture.

Conditions of Certification

Background for Condition #1:

Part 1.5 of the Draft PGP states “Operators must comply with all other applicable federal and state laws and regulations that pertain to the application of pesticides....”

Regulatory Citations and Guidance

The New Mexico Pesticide Control Act (NMSA 1978 §§ 76-4-1 to -39) gives the New Mexico Department of Agriculture (NMDA) authority over pesticides and pesticide applicators in the state. It includes a number of definitions, requirements, authorities, fee caps, and grounds for license denials, suspension or revocation. Regulations promulgated under the Act include 21.17.50 Pesticides, 20.17.51 Control of Wood-Destroying Pests, 20.17.53 Continuing Education Units for Pesticide Applicators, and 21.17.56 NMAC Restricted-Use Pesticides.

21.17.50.6 NMAC [Objective] states:

The objective of Part 50 of Chapter 17 is to set criteria for the use of pesticides in New Mexico, including the licensing and certification of pesticide applicators, record keeping, equipment inspection, storage and disposal of pesticides.

Condition #1

EPA shall include the following condition in Part 9 of the Final PGP, which is necessary to assure compliance with appropriate requirements of the New Mexico Pesticide Control Act as cited above:

Operators must comply with the New Mexico Pesticide Control Act [New Mexico Statutes Annotated (NMSA) 1978 §§ 76-4-1 to -39] and rules authorized by this Act [Title 21, Chapter 17, Parts 50, 51, 53, and 56 of the New Mexico Administrative Code (NMAC)] administered and enforced by the New Mexico Department Agriculture. More information on pesticide compliance is available at <https://www.nmda.nmsu.edu/nmda-homepage/divisions/aes/pesticides/>.

Background for Condition #2:

Part 1.1.2.2 of the Draft PGP allows “...discharges from pesticide applications made to restore or maintain water quality or to protect public health or the environment that either do not degrade water quality or degrade water quality on a short-term or temporary basis” to Tier 3 waters, also called Outstanding National Resource Waters (ONRWs).

Regulatory Citations and Guidance

20.6.2.1201 NMAC [Notice of Intent to Discharge] states:

A. Except for the notices specified in paragraphs (1) and (2) of this subsection, any person intending to make a new water contaminant discharge or to alter the character or location of an existing water contaminant discharge, unless the discharge is being made or will be made into a community sewer system or subject to the Liquid Waste Disposal Regulations adopted by the New Mexico environmental improvement board, shall file a notice with the ground water quality bureau of the department for discharges that may affect ground water, and/ or the surface water quality bureau of the department for discharges that may affect surface water...

C. Notices shall state:

- (1) the name of the person making the discharge;
- (2) the address of the person making the discharge;
- (3) the location of the discharge;
- (4) an estimate of the concentration of water contaminants in the discharge; and
- (5) the quantity of the discharge.

20.6.4.7(O)(2) NMAC [Definitions] states:

“Oversight agency” means a state or federal agency, such as the United States department of agriculture forest service, that is responsible for land use or water quality management decisions affecting nonpoint source discharges where an outstanding national resource water is located.

20.6.4.8(A) NMAC [Antidegradation Policy and Implementation Plan] states:

(3) No degradation shall be allowed in waters designated by the commission as outstanding national resource waters (ONRWs), except as provided in Subparagraphs (a) through (e) of this paragraph and in Paragraph (4) of this Subsection A.

- (a) After providing a minimum 30-day public review and comment period, the commission determines that allowing temporary and short-term degradation of water quality is necessary to accommodate public health or safety activities in the area in which the ONRW is located. Examples of public health or safety activities include but are not limited to replacement or repair of a water or sewer pipeline or a roadway bridge. In making its decision, the commission shall consider whether the activity will interfere with activities implemented to restore or maintain the chemical, physical or biological integrity of the water... In approving the activity, the commission shall require that:*
 - (i) the degradation shall be limited to the shortest possible time and shall not exceed six months;*
 - (ii) the degradation shall be minimized and controlled by best management practices or in accordance with permit requirements as appropriate; all practical means of minimizing the duration, magnitude, frequency and cumulative effects of such degradation shall be utilized;*
 - (iii) the degradation shall not result in water quality lower than necessary to protect any existing use in the ONRW; and*
 - (iv) the degradation shall not alter the essential character or special use that makes the water an ONRW.*
- (b) Prior to the commission making a determination, the department or appropriate oversight agency shall provide a written recommendation to the commission. If the commission approves the activity, the department or appropriate oversight agency shall oversee implementation of the activity.*
- (c) Where an emergency response action that may result in temporary and short-term degradation to an ONRW is necessary to mitigate an immediate threat to public health or safety, the emergency response action may proceed prior to providing notification required by Subparagraph (a) of this paragraph in accordance with the following:*
 - (i) only actions that mitigate an immediate threat to public health or safety may be undertaken pursuant to this provision; non-emergency portions of the action shall comply with the requirements of Subparagraph (a) of this paragraph;*
 - (ii) the discharger shall make best efforts to comply with requirements (i) through (iv) of Subparagraph (a) of this paragraph;*
 - (iii) the discharger shall notify the department of the emergency response action in writing within seven days of initiation of the action;*
 - (iv) within 30 days of initiation of the emergency response action, the discharger shall provide a summary of the action taken, including all actions taken to comply with requirements (i) through (iv) of Subparagraph (a) of this paragraph.*
- (d) Preexisting land-use activities, including grazing, allowed by federal or state law prior to designation as an ONRW, and controlled by best management practices (BMPs), shall be allowed to continue*

so long as there are no new or increased discharges resulting from the activity after designation of the ONRW.

(e) Acequia operation, maintenance, and repairs are not subject to new requirements because of ONRW designation. However, the use of BMPs to minimize or eliminate the introduction of pollutants into receiving waters is strongly encouraged.

(4) This antidegradation policy does not prohibit activities that may result in degradation in surface waters of the state when such activities will result in restoration or maintenance of the chemical, physical or biological integrity of the water.

(a) For ONRWs, the department or appropriate oversight agency shall review on a case-by-case basis discharges that may result in degradation from restoration or maintenance activities, and may approve such activities in accordance with the following:

(i) the degradation shall be limited to the shortest possible time;

(ii) the degradation shall be minimized and controlled by best management practices or in accordance with permit requirements as appropriate, and all practical means of minimizing the duration, magnitude, frequency and cumulative effects of such degradation shall be utilized;

(iii) the degradation shall not result in water quality lower than necessary to protect any existing use of the surface water; and

(iv) the degradation shall not alter the essential character or special use that makes the water an ONRW.

20.6.4.9 NMAC [Waters classified as ONRWs] states:

D. The following waters are classified as ONRWs:

(1) Rio Santa Barbara, including the west, middle and east forks from their headwaters downstream to the boundary of the Pecos Wilderness; and

(2) the waters within the United States forest service Valle Vidal special management unit...

(3) the named perennial surface waters of the state... located within United States department of agriculture forest service wilderness... [in the following basins: a. the Rio Grande basin, b. the Pecos River basin, c. the Gila River basin, d. the Canadian River basin, e. the San Francisco River basin, f. the Mimbres Closed basin, g. the Tularosa Closed basin, and wetlands identified in designated ONRWs within wilderness areas].

20.6.4.13 NMAC [General Criteria] states:

F. Toxic Pollutants: (1) Except as provided in 20.6.4.16 NMAC, surface waters of the state shall be free of toxic pollutants from other than natural causes in amounts, concentrations or combinations that affect the propagation of fish or that are toxic to humans, livestock or other animals, fish or other aquatic organisms, wildlife using aquatic environments for habitation or aquatic organisms for food, or that will or can reasonably be expected to bioaccumulate in tissues of fish, shellfish and other aquatic organisms to levels that will impair the health of aquatic organisms or wildlife or result in unacceptable tastes, odors or health risks to human consumers of aquatic organisms...

20.6.4.16 NMAC [Planned Use of a Pesticide] states:

...the person whose application is covered by the NPDES permit shall meet the additional notification and monitoring requirements outlined in Subsection G of 20.6.4.16 NMAC.

A. ...The [notice of intent] shall contain, at a minimum, the following information:

(1) petitioner's name and address;

(2) identity of the pesticide and the period of time (not to exceed five years) or number of applications for which approval is requested;

(6) surface water of the state proposed for treatment;

(9) documentation of notice requesting public comment on the proposed use within a 30-day period, including information as described in Paragraphs (1), (2) and (6) of Subsection A of 20.6.4.16 NMAC, provided to:

- (a) local political subdivisions;
- (b) local water planning entities;
- (c) local conservancy and irrigation districts; and
- (d) local media outlets, except that the petitioner shall only be required to publish notice in a newspaper of circulation in the locality affected by the proposed use.

F. ...[the Operator shall be required] to implement posttreatment assessment monitoring and provide notice to the public in the immediate and near downstream vicinity of the application prior to and during the application.

G. Any person whose application is covered by a NPDES permit shall provide written notice to local entities as described in Subsection A of 20.6.4.16 NMAC and implement post-treatment assessment monitoring within the application area as described in Subsection F of 20.6.4.16 NMAC.

Statewide Water Quality Management Plan and Continuing Planning Process (WQMP/CPP)

The WQMP/CPP states:

3 Antidegradation Review Requirements

The antidegradation review procedure is based on the protection tier assigned to the receiving water, the type of receiving water, existing (i.e., baseline) water quality in the receiving water, the projected impacts, and nature of the proposed discharge. In general, the antidegradation review requirements described in this guidance apply to regulated discharges that have the potential to degrade water quality. These include NPDES point source discharges regulated under Section 402 of the CWA; discharges which result in the placement of dredged or fill material into surface waters regulated under Section 404 of the CWA; and any discharge authorized by federal permits and licenses that are subject to state water quality certification under Section 401 of the CWA.

3.5 General NPDES Permits

A number of discharges to surface waters are authorized under general NPDES permits. These include stormwater runoff from municipalities required to comply with the Phase II MS4 stormwater permit, industrial activities covered by the stormwater program (Multi Sector General Permits), stormwater from construction sites one acre or larger (Construction General Permits), pesticide applications in or adjacent to surface waters (Pesticide General Permit), and concentrated animal feeding operations (CAFOs).

Compliance with the terms and conditions of the general permits is required to maintain authorization to discharge under the general permit. Discharges covered by a general permit that do not comply with general permit conditions or antidegradation requirements will be required to seek coverage under an individual permit.

Overview of the Antidegradation Review for General Permits

Regulated discharges authorized by general permits are not required to undergo a Tier 2 antidegradation review as part of the permitting process. However, new and reissued general permits must be evaluated to consider the potential for significant degradation as a result of the permitted discharges.

Discharges that comply with general permits are not likely to cause significant degradation of water quality. In addition, activities covered under general permits (e.g., construction, industries, municipalities, dairies, feedlots, etc.) are considered to have social and economic importance to New Mexico. Therefore, antidegradation review for general permits will be based on whether or not the permit conditions are met and if the BMPs are effective at limiting (or eliminating) pollutant loading to minimize water quality impacts.

EPA Region 6's Procedures for Implementing NPDES Permits in New Mexico (NMIP)

The NMIP states:

III. Antidegradation Implementation Between Federal and State Policies

A. General

The Antidegradation Policy and Implementation Plan section of the NMWQS sets forth the requirements to protect designated uses through implementation of the State water quality standards. Furthermore, the policy sets forth the intent to protect the existing quality of those waters, whose quality exceeds their designated use. The limitations and monitoring requirements set forth in a proposed permit must be protective of the State water quality standards and designated uses. Permit requirements must be protective of the assimilative capacity of the receiving waters, which are protective of the designated uses of that water.

Condition #2

EPA shall include the following condition in Part 9 of the Final PGP to reasonably ensure that the permitted pesticide discharge activities to Tier 3 designated ONRWs listed in 20.6.4.9(D) NMAC will be conducted in a manner that will comply with applicable State water quality standards, including the antidegradation policy, and statewide water quality management plan:

Operators are not eligible for coverage under this permit for discharges to Tier 3 designated Outstanding National Resource Waters (ONRWs) listed in 20.6.4.9(D) New Mexico Administrative Code (NMAC), except for discharges from pesticide applications that will result in restoration or maintenance of the chemical, physical or biological integrity of the ONRW. Prior to pesticide application discharge to an ONRW for restoration or maintenance activities, Operators shall submit a copy of the Notice of Intent (NOI), project plan, and Notice of Termination (NOT) to the NMED for review. NMED, or the appropriate oversight agency, will review on a case-by-case basis discharges that may result in degradation from restoration or maintenance activities. In the NOI and project plan, Operators must demonstrate that the degradation from restoration or maintenance activities (1) will be limited to the shortest possible time; (2) will be minimized and controlled by best management practices or in accordance with permit requirements as appropriate, and all practical means of minimizing the duration, magnitude, frequency and cumulative effects of such degradation shall be utilized; (3) will not result in water quality lower than necessary to protect any existing use of the surface water; and (4) will not alter the essential character or special use that makes the water an ONRW. Discharges that will not comply with these antidegradation requirements will be required to seek coverage under an individual permit.

All requested material should be sent to:

New Mexico Environment Department
Surface Water Quality Bureau
P.O. Box 5469
Santa Fe, NM 87502-5469
Telephone: (505) 827-0187

Background for Condition #3:

Regulatory Citations and Guidance

20.6.2.1201 NMAC [Notice of Intent to Discharge] states:

A. Except for the notices specified in paragraphs (1) and (2) of this subsection, any person intending to make a new water contaminant discharge or to alter the character or location of an existing water contaminant discharge, unless the discharge is being made or will be made into a community sewer

system or subject to the Liquid Waste Disposal Regulations adopted by the New Mexico environmental improvement board, shall file a notice with the ground water quality bureau of the department for discharges that may affect ground water, and/ or the surface water quality bureau of the department for discharges that may affect surface water...

C. Notices shall state:

- (1) the name of the person making the discharge;
- (2) the address of the person making the discharge;
- (3) the location of the discharge;
- (4) an estimate of the concentration of water contaminants in the discharge; and
- (5) the quantity of the discharge.

20.6.4.8(A) NMAC [Antidegradation Policy and Implementation Plan] states:

4. This antidegradation policy does not prohibit activities that may result in degradation in surface waters of the state when such activities will result in restoration or maintenance of the chemical, physical or biological integrity of the water.

(b) For surface waters of the state other than ONRWs, the department shall review on a case-by-case basis discharges that may result in degradation from restoration or maintenance activities, and may approve such activities in accordance with the following:

- (i) the degradation shall be limited to the shortest possible time;
- (ii) the degradation shall be minimized and controlled by best management practices or in accordance with permit requirements as appropriate, and all practical means of minimizing the duration, magnitude, frequency and cumulative effects of such degradation shall be utilized; and
- (iii) the degradation shall not result in water quality lower than necessary to protect any existing use of the surface water.

20.6.4.13 NMAC [General Criteria] states:

F. Toxic Pollutants: (1) Except as provided in 20.6.4.16 NMAC, surface waters of the state shall be free of toxic pollutants from other than natural causes in amounts, concentrations or combinations that affect the propagation of fish or that are toxic to humans, livestock or other animals, fish or other aquatic organisms, wildlife using aquatic environments for habitation or aquatic organisms for food, or that will or can reasonably be expected to bioaccumulate in tissues of fish, shellfish and other aquatic organisms to levels that will impair the health of aquatic organisms or wildlife or result in unacceptable tastes, odors or health risks to human consumers of aquatic organisms...

Statewide Water Quality Management Plan and Continuing Planning Process (WQMP/CPP)

The WQMP/CPP states:

3 Antidegradation Review Requirements

The antidegradation review procedure is based on the protection tier assigned to the receiving water, the type of receiving water, existing (i.e., baseline) water quality in the receiving water, the projected impacts, and nature of the proposed discharge. In general, the antidegradation review requirements described in this guidance apply to regulated discharges that have the potential to degrade water quality. These include NPDES point source discharges regulated under Section 402 of the CWA; discharges which result in the placement of dredged or fill material into surface waters regulated under Section 404 of the CWA; and any discharge authorized by federal permits and licenses that are subject to state water quality certification under Section 401 of the CWA.

3.5 General NPDES Permits

A number of discharges to surface waters are authorized under general NPDES permits. These include stormwater runoff from municipalities required to comply with the Phase II MS4 stormwater permit,

industrial activities covered by the stormwater program (Multi Sector General Permits), stormwater from construction sites one acre or larger (Construction General Permits), pesticide applications in or adjacent to surface waters (Pesticide General Permit), and concentrated animal feeding operations (CAFOs).

Compliance with the terms and conditions of the general permits is required to maintain authorization to discharge under the general permit. Discharges covered by a general permit that do not comply with general permit conditions or antidegradation requirements will be required to seek coverage under an individual permit.

Overview of the Antidegradation Review for General Permits

Regulated discharges authorized by general permits are not required to undergo a Tier 2 antidegradation review as part of the permitting process. However, new and reissued general permits must be evaluated to consider the potential for significant degradation as a result of the permitted discharges.

Discharges that comply with general permits are not likely to cause significant degradation of water quality. In addition, activities covered under general permits (e.g., construction, industries, municipalities, dairies, feedlots, etc.) are considered to have social and economic importance to New Mexico. Therefore, antidegradation review for general permits will be based on whether or not the permit conditions are met and if the BMPs are effective at limiting (or eliminating) pollutant loading to minimize water quality impacts.

EPA Region 6's Procedures for Implementing NPDES Permits in New Mexico (NMIP)

The NMIP states:

III. Antidegradation Implementation Between Federal and State Policies

A. General

The Antidegradation Policy and Implementation Plan section of the NMWQS sets forth the requirements to protect designated uses through implementation of the State water quality standards. Furthermore, the policy sets forth the intent to protect the existing quality of those waters, whose quality exceeds their designated use. The limitations and monitoring requirements set forth in a proposed permit must be protective of the State water quality standards and designated uses. Permit requirements must be protective of the assimilative capacity of the receiving waters, which are protective of the designated uses of that water.

Condition #3

EPA shall include the following condition in Part 9 of the Final PGP to reasonably ensure that the permitted pesticide discharge activities to surface waters other than ONRWs will be conducted in a manner that will comply with applicable State water quality standards, including the antidegradation policy, and statewide water quality management plan:

Prior to pesticide application discharge to surface waters other than ONRWs for restoration or maintenance activities that may result in temporary and short-term degradation, Operators shall submit a copy of the Notice of Intent (NOI), project plan, and Notice of Termination (NOT) to the NMED for review. NMED, or the appropriate oversight agency, will review on a case-by-case basis discharges that may result in temporary and short-term degradation from restoration or maintenance activities. In the NOI and project plan, Operators must demonstrate that the degradation from restoration or maintenance activities (1) will be limited to the shortest possible time; (2) will be minimized and controlled by best management practices or in accordance with permit requirements as appropriate, and all practical means of minimizing the duration, magnitude, frequency and cumulative effects of such degradation shall be utilized; and (3) will not result in water quality lower than necessary to

protect any existing use of the surface water. Discharges that will not comply with these antidegradation requirements will be required to seek coverage under an individual permit.

All requested material should be sent to:
New Mexico Environment Department
Surface Water Quality Bureau
P.O. Box 5469
Santa Fe, NM 87502-5469
Telephone: (505) 827-0187

Background for Condition #4:

Regulatory Citations and Guidance

20.6.4.13 NMAC [General Criteria] states:

F. Toxic Pollutants: (1) Except as provided in 20.6.4.16 NMAC, surface waters of the state shall be free of toxic pollutants from other than natural causes in amounts, concentrations or combinations that affect the propagation of fish or that are toxic to humans, livestock or other animals, fish or other aquatic organisms, wildlife using aquatic environments for habitation or aquatic organisms for food, or that will or can reasonably be expected to bioaccumulate in tissues of fish, shellfish and other aquatic organisms to levels that will impair the health of aquatic organisms or wildlife or result in unacceptable tastes, odors or health risks to human consumers of aquatic organisms...

20.6.4.16 NMAC [Planned Use of a Piscicide] states:

The use of a piscicide registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. Section 136 et seq., and under the New Mexico Pesticide Control Act (NMPCA), Section 76-4-1 et seq. NMSA 1978 (1973) in a surface water of the state, shall not be a violation of Subsection F of 20.6.4.13 NMAC when such use is covered by a federal national pollutant discharge elimination system (NPDES) permit or has been approved by the commission under procedures provided in this section. The use of a piscicide which is covered by a NPDES permit shall require no further review by the commission and the person whose application is covered by the NPDES permit shall meet the additional notification and monitoring requirements outlined in Subsection G of 20.6.4.16 NMAC...

A. ...The [notice] shall contain, at a minimum, the following information:

- (1) petitioner's name and address;*
- (2) identity of the piscicide and the period of time (not to exceed five years) or number of applications for which approval is requested;*
- (6) surface water of the state proposed for treatment;*
- (9) documentation of notice requesting public comment on the proposed use within a 30-day period, including information as described in Paragraphs (1), (2) and (6) of Subsection A of 20.6.4.16 NMAC, provided to:*
 - (a) local political subdivisions;*
 - (b) local water planning entities;*
 - (c) local conservancy and irrigation districts; and*
 - (d) local media outlets, except that the petitioner shall only be required to publish notice in a newspaper of circulation in the locality affected by the proposed use.*

F. ...[the Operator shall be required] to implement post-treatment assessment monitoring and provide notice to the public in the immediate and near downstream vicinity of the application prior to and during the application.

G. Any person whose application is covered by a NPDES permit shall provide written notice to local entities as described in Subsection A of 20.6.4.16 NMAC and implement post-treatment assessment monitoring within the application area as described in Subsection F of 20.6.4.16 NMAC.

Condition #4

EPA shall include the following condition in Part 9 of the Final PGP to reasonably ensure that the permitted pesticide discharge activities to surface waters will be conducted in a manner that will comply with applicable State water quality standards:

Operators with coverage under this permit shall meet the additional notification and monitoring requirements outlined in 20.6.4.16(G) NMAC, including written notice to local political subdivisions, local water planning entities, local conservancy and irrigation districts, and local media outlets. Operators shall implement post-treatment assessment monitoring within the application area and provide notice to the public in the immediate and near downstream vicinity of the application prior to and during the application.

Background for Condition #5:

Part 5.1.4 Response Procedures of the Draft PGP requires decision-makers have procedures for notification of spill and adverse incidents.

Regulatory Citations and Guidance

20.6.2.1203 [Notification of Discharge Removal] states:

A. With respect to any discharge from any facility of oil or other water contaminant, in such quantity as may with reasonable probability injure or be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare or the use of property, the following notifications and corrective actions are required:

- (1) As soon as possible after learning of such a discharge, but in no event more than twenty-four (24) hours thereafter, any person in charge of the facility shall orally notify the chief of the ground water quality bureau of the department, or the appropriate counterpart in any constituent agency delegated responsibility for enforcement of these rules as to any facility subject to such delegation. To the best of that person's knowledge, the following items of information shall be provided:*
 - (a) the name, address, and telephone number of the person or persons in charge of the facility, as well as of the owner and/or operator of the facility;*
 - (b) the name and address of the facility;*
 - (c) the date, time, location, and duration of the discharge;*
 - (d) the source and cause of discharge;*
 - (e) a description of the discharge, including its chemical composition;*
 - (f) the estimated volume of the discharge; and*
 - (g) any actions taken to mitigate immediate damage from the discharge.*
- (2) When in doubt as to which agency to notify, the person in charge of the facility shall notify the chief of the ground water quality bureau of the department. If that department does not have authority pursuant to commission delegation, the department shall notify the appropriate constituent agency.*
- (3) Within one week after the discharger has learned of the discharge, the facility owner and/or operator shall send written notification to the same department official, verifying the prior oral notification as to each of the foregoing items and providing any appropriate additions or corrections to the information contained in the prior oral notification.*
- (4) The oral and written notification and reporting requirements contained in this Subsection A are not intended to be duplicative of discharge notification and reporting requirements promulgated by the oil conservation commission (OCC) or by the oil conservation division (OCD); therefore, any facility which is subject to OCC or OCD discharge notification and reporting requirements need not additionally comply with the notification and reporting requirements herein.*

- (5) *As soon as possible after learning of such a discharge, the owner/operator of the facility shall take such corrective actions as are necessary or appropriate to contain and remove or mitigate the damage caused by the discharge.*
 - (6) *If it is possible to do so without unduly delaying needed corrective actions, the facility owner/operator shall endeavor to contact and consult with the chief of the ground water quality bureau of the department or appropriate counterpart in a delegated agency, in an effort to determine the department's views as to what further corrective actions may be necessary or appropriate to the discharge in question. In any event, no later than fifteen (15) days after the discharger learns of the discharge, the facility owner/operator shall send to said Bureau Chief a written report describing any corrective actions taken and/or to be taken relative to the discharge. Upon a written request and for good cause shown, the bureau chief may extend the time limit beyond fifteen (15) days.*
 - (7) *The bureau chief shall approve or disapprove in writing the foregoing corrective action report within thirty (30) days of its receipt by the department. In the event that the report is not satisfactory to the department, the bureau chief shall specify in writing to the facility owner/operator any shortcomings in the report or in the corrective actions already taken or proposed to be taken relative to the discharge, and shall give the facility owner/operator a reasonable and clearly specified time within which to submit a modified corrective action report. The bureau chief shall approve or disapprove in writing the modified corrective action report within fifteen (15) days of its receipt by the department.*
 - (8) *In the event that the modified corrective action report also is unsatisfactory to the department, the facility owner/operator has five (5) days from the notification by the bureau chief that it is unsatisfactory to appeal to the department secretary. The department secretary shall approve or disapprove the modified corrective action report within five (5) days of receipt of the appeal from the bureau chief's decision. In the absence of either corrective action consistent with the approved corrective action report or with the decision of the secretary concerning the shortcomings of the modified corrective action report, the department may take whatever enforcement or legal action it deems necessary or appropriate.*
 - (9) *If the secretary determines that the discharge causes or may with reasonable probability cause water pollution in excess of the standards and requirements of Section 20.6.2.4103 NMAC, and the water pollution will not be abated within one hundred and eighty (180) days after notice is required to be given pursuant to Paragraph (1) of Subsection A of Section 20.6.2.1203 NMAC, the secretary may notify the facility owner/operator that he is a responsible person and that an abatement plan may be required pursuant to Section 20.6.2.4104 and Subsection A of Section 20.6.2.4106 NMAC.*
- B. Exempt from the requirements of this section are continuous or periodic discharges which are made:*
- (1) in conformance with regulations of the commission and rules, regulations or orders of other state or federal agencies; or*
 - (2) in violation of regulations of the commission, but pursuant to an assurance of discontinuance or schedule of compliance approved by the commission or one of its duly authorized constituent agencies.*
- C. As used in this section and in Sections 20.6.2.4100 through 20.6.2.4115 NMAC, but not in other sections of this part:*
- (1) "discharge" means spilling, leaking, pumping, pouring, emitting, emptying, or dumping into water or in a location and manner where there is a reasonable probability that the discharged substance will reach surface or subsurface water;*
 - (2) "facility" means any structure, installation, operation, storage tank, transmission line, motor vehicle, rolling stock, or activity of any kind, whether stationary or mobile;*
 - (3) "oil" means oil of any kind or in any form including petroleum, fuel oil, sludge, oil refuse and oil mixed with wastes;*
 - (4) "operator" means the person or persons responsible for the overall operations of a facility; and*

(5) "owner" means the person or persons who own a facility, or part of a facility.

D. Notification of discharge received pursuant to this part or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except for perjury or for giving a false statement.

E. Any person who has any information relating to any discharge from any facility of oil or other water contaminant, in such quantity as may with reasonable probability injure or be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare or the use of property, is urged to notify the chief of the ground water quality bureau of the department. Upon such notification, the secretary may require an owner/operator or a responsible person to perform corrective actions pursuant to Paragraphs (5) and (9) of Subsection A of Section 20.6.2.1203 NMAC.

Condition #5

EPA shall include the following condition in Part 9 of the Final PGP to ensure compliance with appropriate notification, removal, reporting and corrective action requirements in Ground and Surface Water Protection regulations in 20.6.2.1203 NMAC:

Operators must comply with applicable notification and removal requirements for spills and adverse incidents in 20.6.2.1203 NMAC. For an Environmental EMERGENCY (24-hrs) call: 505-827-9329; and for non-emergencies call: 866-428-6535 (voice mail, 24 hours/day). For more information as to what further corrective actions may be necessary or appropriate for spills or adverse incidents that affect surface water quality, an Operator may also contact the NMED Surface Water Quality Bureau at:

New Mexico Environment Department
Surface Water Quality Bureau
1190 South Saint Francis Drive
P.O. Box 5469
Santa Fe, NM 87502-5469
Telephone: (505) 827-0187

Background for Condition #6:

Regulatory Citations and Guidance

20.6.4.7(S)(5) NMAC [Definitions] states:

"Surface water(s) of the state" means all surface waters situated wholly or partly within or bordering upon the state, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, reservoirs or natural ponds. Surface waters of the state also means all tributaries of such waters, including adjacent wetlands, any manmade bodies of water that were originally created in surface waters of the state or resulted in the impoundment of surface waters of the state, and any "waters of the United States" as defined under the Clean Water Act that are not included in the preceding description. Surface waters of the state does not include private waters that do not combine with other surface or subsurface water or any water under tribal regulatory jurisdiction pursuant to Section 518 of the Clean Water Act. Waste treatment systems, including treatment ponds or lagoons designed and actively used to meet requirements of the Clean Water Act (other than cooling ponds as defined in 40 CFR Part 423.11(m) that also meet the criteria of this definition), are not surface waters of the state, unless they were originally created in surface waters of the state or resulted in the impoundment of surface waters of the state.

20.6.2.1201 NMAC [Notice of Intent to Discharge] states:

A. ... any person intending to make a new water contaminant discharge or to alter the character or location of an existing water contaminant discharge, unless the discharge is being made or will be made into a community sewer system or subject to the Liquid Waste Disposal Regulations adopted by

the New Mexico environmental improvement board, shall file a notice with the ground water quality bureau of the department for discharges that may affect ground water, and/ or the surface water quality bureau of the department for discharges that may affect surface water.

B. ... any person intending to inject fluids into a well, including a subsurface distribution system, unless the injection is being made subject to the Liquid Waste Disposal Regulations adopted by the New Mexico environmental improvement board, shall file a notice with the ground water quality bureau of the department.

C. Notices shall state:

- (1) the name of the person making the discharge;*
- (2) the address of the person making the discharge;*
- (3) the location of the discharge;*
- (4) an estimate of the concentration of water contaminants in the discharge; and*
- (5) the quantity of the discharge.*

D. Based on information provided in the notice of intent, the department will notify the person proposing the discharge as to which of the following apply:

- (1) a discharge permit is required;*
- (2) a discharge permit is not required;...*

Condition #6

EPA shall include the following condition in Part 9 of the Final PGP to reasonably ensure that the permitted pesticide discharge activities to surface waters of the State will be conducted in a manner that will comply with applicable State NOI regulations in 20.6.2.1201 NMAC:

Pursuant to 20.6.2.1201 NMAC, for pesticide application discharges that are not covered by this permit, Operators shall file a notice of intent to discharge with the NMED Ground Water Quality Bureau for discharges that may affect groundwater, and/or the NMED Surface Water Quality Bureau for discharges that may affect surface water.

All such notices and related material should be sent to:

New Mexico Environment Department
Ground Water Quality Bureau (GWQB)
Surface Water Quality Bureau (SWQB)
1190 South Saint Francis Drive
P.O. Box 5469
Santa Fe, NM 87502-5469
Telephone: (505) 827-0187, SWQB or (505) 827-2900, GWQB

Comments that are not Conditions of Certification:

NMED comments on the proposed PGP were submitted to Docket ID # EPA-HQ-OW-2020-0005-0001 via the Regulations.gov website on March 15, 2021.